U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2004

Case No: 2003-BLA-5585

In the Matter of

GARRETT HALCOMB,
Claimant

v.

CONSOLIDATION COAL CO.,
Employer,

CONSOL ENERGY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: (On briefs)

W. Andrew Delph, Esquire
For the claimant

Natalee Gilmore, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On March 14, 2003, this case was referred to the Office of Administrative Law Judges for a formal hearing. A hearing was scheduled; however, the claimant subsequently filed a motion for a decision on the record, and indicated that the employer had no objection. By an Order dated September 4, 2003, claimant's motion for a decision on the record was granted and the parties were afforded the opportunity to submit written closing arguments and/or briefs. Following this order, both parties submitted closing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively.

ISSUES

The following issues remain for resolution:

1. the length of the miner's coal mine employment;

2. whether the miner has pneumoconiosis as defined by the Act and regulations;

3. whether the miner's pneumoconiosis arose out of coal mine employment;

4. whether the miner is totally disabled;

5. whether the miner's disability is due to pneumoconiosis;

6. whether the miner's most recent period of cumulative employment of not less than one year was with the responsible operator.

The employer also contests other issues, including the constitutionality of the new regulations, that are identified at line 18 on the list of issues. (DX 35). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Garrett Halcomb, was born on January 8, 1933. He completed school through the seventh grade. Mr. Halcomb's wife, Sadie, died on December 13, 2000 and he has not remarried. He had no children who were under eighteen or dependent upon him at this time this claim was filed. Mr.Halcomb reported that he began working in the coal mines in 1951 for Blue Diamond, where he loaded coal. He last worked for Consolidation Coal Company in Lebanan, Virginia, where he hauled coal by shuttle car. Claimant retired from Consolidation Coal on April 1, 1991. (DX 4, 9).

Mr. Halcomb filed his first application for black lung benefits on May 2, 1991. The Office of Workers' Compensation Programs denied the request for benefits on February 13, 1992, and the claim was subsequently withdrawn by Claimant. (DX 1). Mr. Halcomb filed a second claim for benefits on May 24, 1994. The claim was denied by the District Director on October 26, 1994 and administratively closed when no further action was taken. (DX 2).

The current claim for benefits was filed on August 31, 2001. (DX 4). The Office of Workers' Compensation Programs issued an initial finding of entitlement on August 8, 2002 and a proposed award on December 18, 2002. (DX 26, 29, 32). Pursuant to the employer's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges. (DX 31, 35).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Mr. Halcomb alleged forty years of coal mine employment. (DX 4). The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1952 to 1991, employment history forms, applications for benefits, W-2 statements, pay stubs and letters from the employer. (DX 4, 5, 6, 7, 8, 9, 10).

The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.l01(a)(32). *See* 20 C.F.R. § 718.301. The regulations provide that to the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. They may be established by any credible evidence including company records, pension records, earnings statements, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it is presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment. 20 C.F.R. § 725.101(a)(32)(ii). If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner

by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. § 725.101(a)(32)(iii). (Attachment No. 1 to Decision and Order.)

Claimant's social security records indicate that he worked in coal mine employment for BDCC Holding Company from the years of 1953 to 1961. The records evidence at least 125 days of employment from 1953 to 1958. Accordingly, I credit him for six years of coal mine employment during this time. The records further indicate that claimant earned only $30 from the company in 1959. The yearly wage in 1958 was $2661.25, so I find that claimant's coal mine employment for this period amounts to .01 of a year. In 1960, the records indicate that claimant worked for at least 125 days. Thus, I credit him for at least one year of coal mine employment during this time. In 1961, he earned $859. The yearly wage during this year was $2645. Accordingly, I credit him for .32 of a year of coal mine employment.

Claimant's social security records indicate that he worked for Stearns Mining from 1962 to 1967. In 1962 he earned $2590 and the yearly wage was $2717.50. Thus, I credit him with .95 of a year of coal mine employment in 1962. From 1963 to 1966 the records indicate full years of coal mine employment, and I credit him with four years of coal mine employment during this time. In 1967, the records show $660 in coal mine employment, and the yearly wage was $3662.50. Thus, I credit him for .18 years of coal mine employment in 1967.

From 1968 to 1991, the records show that Claimant was employed by Consolidation Coal Company. The records evidence full years of employment from 1968 to 1990 and I credit Claimant with 23 years of coal mine employment during this period. In 1991, Claimant earned $15,199.63 in coal mine employment and the yearly wage was $17,080. Thus, I credit him for .89 years of coal mine employment in 1991.

Considering all of the evidence submitted with this claim, I credit claimant with a total of 36.35 years of qualifying coal mine employment.

I also find that the evidence establishes that Claimant last worked in coal mine employment for Consolidation Coal from the years of 1968 to 1991. Thus, I find that the miner's most recent period of cumulative employment of one year was with Consolidation Coal Company. Mr. Halcomb last worked in coal mining as a general inside worker, performing work on the belts, rockdusting, laying track, shoveling, hanging wire, pumping and driving a shuttle car. (DX 1, 2, 5).

Medical Evidence

Medical evidence submitted under a claim for benefits under the Act is subject to two different requirements. First, medical evidence must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies, and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. §725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. §725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy, or autopsy. § 725.414 (a)(2)(ii). Likewise, responsible operators and the district director are subject to identical limitations on affirmative and rebuttal evidence. §725.414(a)(3)(i-iii).[1]

I note that the employer has submitted evidence that exceeds the limitation of evidence, along with a request that such evidence be considered due to the employer's contention that the limitations are unconstitutional. The employer has also submitted a designation of medical evidence form, listing evidence to be considered in the event that I apply the limitations on evidence to this case. Thus, I will consider only the evidence listed on the employer's designation of evidence form, as any other evidence submitted exceeds the Act's limitations.

A. X-ray reports[2]

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/ Qualifications**	**Interpretation**
DX 16	1-17-02	1-17-02	Dahhan, B	No pneumoconiosis
DX 12	1-23-02	6-12-02	Sargent/B/BCR	Quality reading only; quality 1
DX 12	1-23-02	1-23-02	Patel, BCR, B	1/0, s/s, all zones
EX 1	1-23-02	11-18-02	Wiot, BCR, B	0/0
EX 2	11-12-02	11-12-02	Jarboe, B	0/0

[1] If no responsible operator has been named, the evidence obtained in connection with the complete pulmonary evaluation performed pursuant to §725.406 shall be considered evidence obtained and submitted by the Director.

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. §718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

CX 1	5-5-03	5-7-03	Robinette, B	1/1
EX 4	5-5-03	8-22-03	Spitz, BCR, B	Unreadable

B. Pulmonary Function Studies[3]

Exhibit/ Date	**Physician**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Tracings**	**Comments**
DX 16 1-17-02	Dahhan	69/ 66 ¼"	2.77	3.22	77	86%	Yes	
DX 12 1-23-02	Rasmussen	69/ 66"	2.81	3.60	96	78%	Yes	
EX 2 11-12-02	Jarboe	69 169.2 cm	2.81	3.22	77	87%	Yes	

*denotes testing after administration of bronchodilator

[3] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. §718.104(c) . The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1).*Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

C. Arterial Blood Gas Studies[4]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 12	1-23-02	Rasmussen	37	62	Resting	Found acceptable by Dr. Burki
DX 16	1-17-02	Dahhan	38.8	85	Resting	
EX 2	11-12-02	Jarboe	41.1	70.2	Resting	

D. Narrative Medical Evidence

Dr. D.L. Rasmussen examined Mr. Halcomb on January 23, 2002 and prepared a report of his examination. The physician noted coal mine employment from 1951 to 1991, with thirty-three years underground. Dr. Rasmussen noted that the miner complained of frequent colds and pneumonia, and had never smoked. He further noted complaints of sputum production, dyspnea and cough. Dr. Rasmussen performed an x-ray which he noted was interpreted as positive for pneumoconiosis. He performed a pulmonary function study which he noted was normal, and an arterial blood gas study which he indicated showed moderate impairment in oxygen transfer at rest. Dr. Rasmussen diagnosed coal workers' pneumoconiosis which he attributed to forty years of coal mine employment and a positive x-ray for the disease. The physician also diagnosed chronic bronchitis based on a chronic productive cough. He indicated that the claimant's chronic bronchitis was due to his coal mine dust exposure. Dr. Rasmussen checked a box on a form that the miner's impairment was moderate, although he placed a question mark next to the box. He further indicated that the miner was unable to perform his coal mine employment from a respiratory standpoint and that the miner's resting arterial blood gas study met the Act's requirements for total disability. Dr. Rasmussen's report states that coal mine employment and obesity are the risk factors for the miner's respiratory impairment. (DX 12).

Dr. A. Dahhan examined Mr. Halcomb on January 17, 2002 and prepared a report of his examination. Dr. Dahhan noted that the claimant worked in coal mine employment for forty years until he retired in 1991. Dr. Dahhan indicated that the miner had a history of diabetes and was a non-smoker. He performed an arterial blood gas study which he noted was normal and a pulmonary function study which was also normal. The physician performed an x-ray which he interpreted as negative for pneumoconiosis. Dr. Dahhan concluded that there is insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. He based his conclusion on normal test results and no objective findings of pulmonary impairment or disability. Dr. Dahhan

[4] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. §718.105(a).

indicated that from a respiratory standpoint, the miner has the capacity to perform his last coal mine employment and that this conclusion would remain unchanged even if it were determined that Mr. Halcomb had pneumoconiosis. He concluded that the miner does not have a pulmonary disability or impairment which is caused, contributed to or aggravated by his coal mine employment. Dr. Dahhan is Board-certified in Internal Medicine and Pulmonary Medicine. (DX 16). Dr. Dahhan also discussed his qualifications and findings in a deposition. He stated that a review of the other pulmonary function studies in this case evidences normal pulmonary function in Mr. Halcomb. He also noted that the arterial blood gas study performed by Dr. Rasmussen may have been affected by conditions such as barometric pressure, but overall arterial blood gas studies showed minimal hypoxemia on some, but normal values on others, which does not support a finding of a totally disabling respiratory impairment. (EX 5).

Dr. Thomas Jarboe examined the miner on November 12, 2003 and prepared a report of his examination and conclusions. Dr. Jarboe noted that Mr. Halcomb worked for forty years in the coal mine industry, mostly underground, and that he left in 1991 because of retirement. The physician performed a chest x-ray which was interpreted as negative for pneumoconiosis. He also performed a pulmonary function study which was normal and an arterial blood gas study which showed minimal hypoxemia, but still exceeded the Act's qualifying standards. Based on his examination and a review of the medical records, Dr. Jarboe concluded that there is no evidence of pneumoconiosis, based on lack of sufficient evidence to diagnose the disease and normal pulmonary function study, indicating no lung disease. He further found that the miner does not have any pulmonary or respiratory impairment based on normal pulmonary function study and only minimal hypoxemia on the arterial blood gas study. He concluded that Mr. Halcomb is not totally disabled and can perform his previous coal mine employment from a respiratory standpoint. He further noted that Dr. Rasmussen's finding of total disability was based on an arterial blood gas study result that has not been a reproducible finding. Dr. Jarboe is Board-certified in Internal Medicine and Pulmonary Disease. (EX 2). Dr. Jarboe further testified at a deposition regarding his qualifications and examination of the miner. The physician noted that the medication the miner is taking is not for treatment of pneumoconiosis, but for treatment of asthma. He discussed other pulmonary function studies submitted in this case and noted that they were normal, with no evidence of impairment. He noted that arterial blood gas studies were normal, with the exception of the arterial blood gas study performed by Dr. Rasmussen, which showed only minimal hypoxemia. He further stated that this appeared to be an isolated incident, because no other arterial blood gas study produced results close to Dr. Rasmussen's. He stated that several things could be responsible for the non-reproducibility of the study, such as lab error, a cold or bronchospasm. He concluded that even considering the non-reproducible study, the miner's pulmonary function was at most minimally reduced, and not totally disabled. (EX 6).

E. Other Medical Evidence

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. §725.414(a)(2) and (a)(3), any record of a miner's hospitalization for respiratory or pulmonary or related disease may be received into evidence. 20 C.F.R. § 725.414 (a)(4). Furthermore, a party may submit "other medical evidence" reported by a physician and not specifically addressed under the regulations under section 718.107, such as a CT scan.

Mr. Halcomb's medical records from Pineville Community Hospital were submitted as evidence in this claim. These records report diagnoses of ASHD and chest pain and include reports of x-rays which were not performed for the diagnosis of pneumoconiosis. The record also include the results of other non-pulmonary procedures and testing. (DX 14).

The record also includes medical records from Dr. Steven Morgan. These records indicate that Mr. Halcomb suffers from stable heart disease, ASHD, thyroid disease, hypertension and diabetes. (DX 15).

DISCUSSION AND APPLICABLE LAW

Because Mr. Halcomb filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Refiled Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless "the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits.

Accordingly, I must review the evidence submitted subsequent to October 26, 1994, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Mr. Halcomb in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If Claimant establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

(a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.

(1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains six interpretations of four chest x-rays. Of these interpretations, four were negative for pneumoconiosis while two were positive.

The issue of numerical superiority often arises with regard to evaluating medical evidence. The Board has held that an administrative law judge is not required to defer to the numerical superiority of medical evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). *See also Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (use of numerical

superiority upheld in weighing blood gas studies); *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease).

An x-ray taken on January 17, 2002 was interpreted as negative by Dr. Dahhan, who is a B-reader. An x-ray taken on January 23, 2002 was interpreted as positive by Dr. Patel, who is dually-qualified, and as negative by Dr. Wiot, who is also dually-qualified. The third x-ray, taken on November 12, 2002, was interpreted only as negative by Dr. Jarboe, who is a B-reader. The final x-ray, taken on May 5, 2003 was interpreted as positive by Dr. Robinette, who is a B-reader. However, Dr. Spitz, who is a dually-qualified physician, found that the film was unreadable for diagnosis of pneumoconiosis according to the Act's standards because it was overexposed. Thus, I find that this x-ray is not probative for determination of the existence of pneumoconiosis. Because the negative readings constitute the majority of interpretations and are verified by more, highly qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on the miner's positive x-ray and his coal mine employment. However, in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. In *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985), the Benefits Review Board explained that the fact that a miner worked for a certain period of time in the coal mines alone "does not tend to establish that he does not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.* The Benefits Review Board has held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor*, 8 B.L.R. 1-405). Thus, I grant Dr. Rasmussen's opinion no weight on this issue.

Dr. Dahhan determined that Mr. Halcomb does not have pneumoconiosis. His opinion was based on normal test results and no objective findings of pulmonary impairment or disability. His opinion is consistent with the medical evidence of record. Furthermore, it is adequately well-reasoned and sufficiently states the bases on which it was formed. Thus, I grant it probative weight on this issue.

Dr. Jarboe also determined that the claimant does not have pneumoconiosis. He based his opinion on the lack of evidence indicating pneumoconiosis and normal tests results. His opinion is well-reasoned and well documented and is consistent with the medical evidence of record.

After considering all of the narrative evidence on the issue of pneumoconiosis, I find that claimant has failed to establish by a preponderance of the evidence that he has pneumoconiosis. Because claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis under any of the methods contained in section 718.202(a). As the evidence does not establish the existence of pneumoconiosis, this claim cannot succeed. Regardless, even if the evidence had established this element, it fails to prove that claimant has a totally disabling respiratory impairment, another requisite element of entitlement.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function tests or arterial blood gas studies.[5]

In the pulmonary function studies of record, there is a discrepancy in the height attributed to the claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, or sixty-six inches.

All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

The pulmonary function tests submitted after the previous denial conform to the applicable quality standards. The tests did not produce qualifying values, however. Accordingly, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The arterial blood gas studies submitted after the previous denial conform to the applicable quality standards. One test, performed on January 23, 2002, produced a qualifying value. The qualifying test produced a value that is just within the Act's qualifying values, as a pO_2 value of 63 or below is qualifying, and claimant's test result was a 62. However, two tests, one performed less than a week before the qualifying test, and a test performed ten months after the qualifying tests, failed to produce qualifying values. Furthermore, Drs. Jarboe and Dahhan both testified regarding factors that may affect an arterial blood gas study, and found the qualifying test to be an isolated incident. Accordingly, after considering all of the arterial blood gas studies, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to

support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In assessing total disability under § 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Dr. Rasmussen determined that claimant is totally disabled from a respiratory standpoint. His opinion, however, was based solely on the fact that the miner's arterial blood gas study produced qualifying values. As discussed above, this test result appears to be an isolated incident, and claimant's arterial blood gas test results as a whole exceed the Act's qualifying values. Thus, I grant no weight to Dr. Rasmussen's opinion on this issue.

Drs. Dahhan and Jarboe both determined that the claimant is not totally disabled from a respiratory standpoint. Their opinions are each well-reasoned and well-documented. Their conclusions are adequately explained and are consistent with the medical evidence of record and thus, I grant them probative weight on this issue.

After considering all of the evidence relative to total respiratory disability, I find that the evidence does not establish by a preponderance of the evidence that Mr. Halcomb is totally disabled from a respiratory standpoint.

After considering all of the evidence relative to the elements of entitlement on which Mr. Halcomb's previous claims were denied, I find that claimant has not established a material change in condition.

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment, the elements of entitlement on which Mr. Halcomb's previous claims were denied. Accordingly, the claim of Garrett Halcomb must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Garrett Halcomb for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.